

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Request for Review of the
Decision of the
Universal Service Administrator by
Virginia State Department of Education
Richmond, Virginia
Federal-State Joint Board on
Universal Service
Changes to the Board of Directors of the
National Exchange Carrier Association, Inc.

File No. SLD-163045
CC Docket No. 96-45
CC Docket No. 97-21

ORDER

Adopted: May 10, 2002

Released: May 13, 2002

By the Wireline Competition Bureau:

1. The Wireline Competition Bureau has under consideration a Request for Review filed by the Virginia State Department of Education (Virginia DOE), Richmond, Virginia. Virginia DOE seeks review of a decision issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator) relating to Virginia DOE's application for discounts under the schools and libraries universal service support mechanism. For the reasons set forth below, we deny the Request for Review.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections. The Communications Act permits only "telecommunications carriers" to receive direct reimbursement under the universal service support mechanisms for the provision of discounted telecommunications services. The term "telecommunications carrier" includes only carriers that

1 Request for Review of the Decision of the Universal Service Administrator by Virginia State Department of Education, CC Docket Nos. 96-45 and 97-21, Request for Review, filed April 16, 2001 (Request for Review).

2 Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

3 47 C.F.R. §§ 54.502, 54.503.

4 Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9005-23, 9084-90 (1997) (Universal Service Order), as corrected by Federal-State Joint Board on Universal Service,

offer telecommunications on a common carrier basis.⁵ The Commission stated in the *Universal Service Order* that a carrier may be a common carrier if it holds itself out “to service indifferently to all potential users,” but a “carrier will not be a common carrier ‘where its practice is to make individualized decisions in particular cases whether and on what terms to serve.’”⁶

3. Under SLD procedures, certain categories of service providers are automatically considered to be eligible telecommunications carriers. Included in this list are incumbent local exchange carriers (ILECs), competitive access providers/competitive local exchange carriers (CAP/CLECs), and interexchange carriers (IXCs) because they are widely acknowledged to be types of service providers that provide telecommunications services on a common carrier basis. Under program procedures, however, even if a service provider self-designates one of these categories, the presumption that they provide service on a common carriage basis remains subject to verification by SLD. If a service provider selects another category listed on the Form 498, such as “PRIV,” SLD will investigate in order to determine whether the service provider offers their services on a common carriage basis. Specifically, SLD looks to whether the relevant state regulatory agency has so classified the provider and whether the provider advertises services as a common carrier. If SLD is unable to confirm that the service provider is an eligible telecommunications carrier based on its own inquiry, SLD will ask the service provider to provide information either confirming or denying that it provides telecommunications services on a common carrier basis.

4. In its application, Virginia DOE requested discounts for telecommunications services from Autotote Communications (Autotote), a publicly-held business specializing in telecommunications services for the racing industry and lottery organizations.⁷ Specifically, Autotote was to provide Virginia DOE with satellite connections for video distance learning.⁸ By letter dated May 5, 2000, SLD denied the request, finding that Virginia DOE requested

CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service Order* in part and reversing and remanding on unrelated grounds), *cert. denied, Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied, AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed, GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000); *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5413-14 (1997) (*Fourth Reconsideration Order*).

⁵ *Universal Service Order*, 12 FCC Rcd at 9177-78; *Fourth Reconsideration Order*, 13 FCC Rcd at 5413-14.

⁶ *Universal Service Order*, 12 FCC Rcd at 9177-78 (citing *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. 1976) (NARUC II)).

⁷ FCC Form 471, Virginia State Department of Education, filed January 17, 2000.

⁸ *Id.*

discounts for telecommunications service from a provider that is not a telecommunications common carrier.⁹

5. Virginia DOE appealed SLD's decision by a letter dated May 10, 2000.¹⁰ On May 10, 2001, SLD affirmed its initial funding decision and denied Virginia DOE's appeal.¹¹ The Administrator's Decision on Appeal explained that the services at issue were to be provided by a service provider that was not eligible to receive universal service support because it did not provide telecommunications services on a common carrier basis.¹² Virginia DOE appeals now this decision, seeking a decision that Autotote is a telecommunications carrier.¹³

6. In the instant Request for Review, Virginia DOE first contends that Autotote is a telecommunications carrier. In support, of this assertion Virginia DOE makes reference to advertisements in trade publications that it claims establish that Autotote sells satellite capacity to the public on a non-discriminatory basis.¹⁴ Virginia DOE also compares the facts relating to its Request for Review to those in a previous appeal before the Commission, *Joplin*.¹⁵ According to Virginia DOE, SLD incorrectly found that Autotote was not an eligible service provider based on Autotote's response on the Service Provider Information Form (Form 498).¹⁶ Specifically, Virginia DOE contends that if the instructions for the Form 498 had been more explicit, Autotote would have classified itself as a common carrier.¹⁷

7. Based on our review of the record, we affirm SLD's determination that Autotote is not a "telecommunications carrier" eligible for universal service support. According to the contract for services, Virginia DOE contracted with Autotote for satellite transponder time.¹⁸ The Commission has determined that companies that simply lease transponder capacity on satellites are not providers of telecommunications services.¹⁹ The Commission found that, in these situations, the satellite is being leased as a midpoint or switch to another

⁹ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Greg Weisiger, Virginia State Department of Education, dated May 5, 2000.

¹⁰ Letter from Lan Neugent, Virginia State Department of Education to Schools and Libraries Division, Universal Service Administrative Company, filed May 12, 2000 (SLD Appeal Letter).

¹¹ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Lan Neugent, Virginia State Department of Education, dated March 30, 2001.

¹² *Id.*

¹³ Request for Review at 1.

¹⁴ Request for Review at 3-4.

¹⁵ Request for Review at 2.

¹⁶ *Id.* See also Universal Service Administrative Company Service Provider Information Form, OMB 3060-0824 (September 1998) (Form 498).

¹⁷ Request for Review at 2.

¹⁸ See Request for Review.

¹⁹ *Fourth Reconsideration Order*, 13 FCC Red at 5477-5479.

telecommunications company which, in turn, uses its own earth-stations to provide end-to-end communications.²⁰ The Commission therefore concluded that because satellite providers do not transmit information when they lease bare transponder capacity, they do not provide telecommunications services.²¹

8. In addition, we are not persuaded by Virginia DOE's assertion that confusion relating to the appropriate characterization of Autotote's principal line of business on the Form 498 resulted in Autotote being improperly classified.²² In Funding Year 3, SLD used the Form 498 to collect information from carriers and service providers participating in the schools and libraries and rural health care programs.²³ According to Virginia DOE, the Form 498 instructions are unclear and misleading for non-traditional communications providers.²⁴ Virginia DOE explains that if SLD or the FCC provided a list of which categories qualify as telecommunications common carriers, it would have been able to select the appropriate category of service.²⁵ Autotote designated "PRIV" as the descriptive category for its principal communications business on its Form 498.²⁶ "PRIV" is defined as a private service provider that offers excess capacity on a private system that is used primarily for internal purposes.²⁷ The record, however, reflects that SLD was unable to substantiate that Autotote was an eligible telecommunications carrier, regardless of the descriptive category on Autotote's Form 498. All of the information found on Autotote's website indicated that their primary business was not related to common carrier service.²⁸ In addition, Autotote has not been designated an eligible

²⁰ *Id.*

²¹ *Id.*

²² Request for Review at 2.

²³ Form 498.

²⁴ Request for Review at 2. *See* Instructions for Completing the Universal Service Administrative Company Service Provider Information Form (FCC Form 498), OMB 3060-0824 (September 1998) (Form 498 Instructions).

²⁵ Request for Review at 2-3.

²⁶ Request for Review at 2.

²⁷ Form 498 Instructions.

²⁸ *See* Autotote website, <www.autotote.com/AutototeCorp/> ("Our company was formed through the acquisition of Scientific Games Holdings, a well-known instant lottery ticket company, by Autotote Corporation, the leading pari-mutuel company in the world...Scientific Games Corporation is made up of four groups, a number of which are the leading competitors in their respective fields. Scientific Games International is the top integrated supplier of instant tickets, validation systems and facilities management services to lotteries. Autotote Systems is the largest supplier of wagering systems and services to racetracks and off-track facilities. Autotote Enterprises is a licensed pari-mutuel operator in Connecticut providing off-track venues for patrons to watch horse racing and/or place bets. The company is also a licensed pari-mutuel operator in Holland and Germany. Telecommunication products utilizes our instant ticket technology to produce prepaid wireless phone cards for major telecommunications companies."). *See also* Autotote Communications Services, <<http://www.autotote.com/AutototeCorp/parimutuel/communication.asp>> ("Autotote Communication Services (ACS), a division of Autotote Systems Inc, is the leading provider of simulcasting services in the United States of America, servicing over fifty tracks and broadcasting over 5,500 racing events each year.").

common carrier in the state of Virginia, and does not have an application pending.²⁹ When subsequently contacted by SLD, Autotote did not respond to SLD's repeated requests for information to validate the eligibility of their services.³⁰ Therefore, SLD was unable to verify that Autotote provided services on a common carrier basis, and appropriately determined that Autotote was not eligible to receive universal service support for telecommunications services.

9. In its appeal to the Commission, Virginia DOE also references advertisements in trade publications that it claims were enclosed in its appeal to SLD that would have established that Autotote sold satellite capacity to the public on a non-discriminatory basis.³¹ Virginia DOE did not produce copies of these publications in their appeal to the Commission and SLD has no record of these enclosures.³² We also note that Virginia DOE failed to reference such enclosures in its appeal letter to SLD.³³ We therefore find these assertions unpersuasive.

10. Finally, Virginia DOE compares the facts relating to their Request for Review to those in a previous appeal before the Bureau, *Joplin*.³⁴ As in the instant appeal, *Joplin* addressed the common carrier status of a service provider based on its Form 498.³⁵ In *Joplin*, the service provider initially characterized itself as a private service provider, but eventually revised the Form 498 to indicate that it was a non-traditional provider. In its appeal to SLD, *Joplin* provided evidence that the Missouri Public Service Commission had certified it as a common carrier.³⁶ Because of the conflicting evidence relating to the service provider's common carrier status, the Common Carrier Bureau remanded *Joplin* to SLD for further consideration.³⁷ Ultimately, SLD

²⁹ Request for Review at 3. Virginia DOE asserts that "because of the national reach of satellite communication, no state PUC certifies Autotote as a common carrier." Under program procedures, even if a service provider is not certified as a common carrier by a state commission, the service provider may still offer independent evidence to SLD that they provide services on a common carrier basis. *See supra* para. 3.

³⁰ The Program Integrity Assurance (PIA) unit contacted Autotote by phone on April 6, 2000 and was told that the contact was busy and would call PIA on April 7, 2000. There is no record that the representative returned the call. PIA attempted to contact Autotote, again, on April 13, 2000, but three of the contact phone numbers that previously worked were now out of service. On April 13, 2000, PIA e-mailed Autotote and requested documentation to validate their eligibility. Autotote did not respond. Prior to this, on March 27, 2000, PIA informed Virginia DOE that documentation validating the service provider did not appear to be forthcoming from Autotote, and that as a result, there was a risk the application would not be able to be processed. *See* PIA Review Contact Report, Virginia State Department of Education, Application No. 163045.

³¹ Request for Review at 3-4.

³² *See* Request for Review.

³³ *See* SLD Appeal Letter.

³⁴ Request for Review at 2.

³⁵ *Request for Review by Joplin R8 Schools District, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-82921, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 3677 (Com. Car. Bur. 2000).

³⁶ *Id.*

³⁷ *Id.*

reversed its decision based in large part due to the fact that the Missouri Public Service Commission certified the service provider as a common carrier.³⁸

11. We emphasize that the ultimate question in *Joplin* and the instant appeal is whether, based on the evidence before the Commission, the service provider is an eligible telecommunications carrier. Virginia DOE's appeal is distinguishable from *Joplin* because in *Joplin*, there was conflicting evidence on the record relating to whether the service provider was a common carrier.³⁹ In the instant appeal, we have no such contradictory evidence before us.

12. Based on the Commission precedent concerning the leasing of satellite transponder time and the absence of information supporting Virginia DOE's contention that Autotote is an eligible telecommunications service provider, including Autotote's own unwillingness to substantiate its status, we affirm SLD's decision that Autotote does not provide telecommunications on a common carrier basis. Given the clear proscription of the *Universal Service Order* against funding telecommunications services provided by entities other than common carriers, it was Virginia DOE's responsibility to ensure that the service provider it had contracted with was indeed a designated telecommunications provider whose status could be appropriately substantiated.⁴⁰ Therefore, we find based on the record before us that Autotote is not eligible to receive direct support under the universal service support mechanism for providing telecommunications services to Virginia DOE.

13. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722 (a), that the Request for Review filed by the Virginia State Department of Education, Richmond, Virginia, on April 16, 2001 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Universal Service Order*, 12 FCC Rcd at 9005-23, 9084-90.